

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

In the Matter of	)	
	)	
McLeodUSA Telecommunications Services, Inc.'s Petition for Modification of the <i>Qwest Omaha Order</i>	)	DA-07-3467
	)	
Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area	)	WC Docket No. 04- 223
	)	

COMMENTS OF TEXALTEL ON THE NOTICE OF THE COMMISSION ON THE  
PETITION FOR MODIFICATION  
OF MCLEOD USA TELECOMMUNICATIONS SERVICES, INC.

**TEXALTEL**

Sheri Hicks  
Policy Director  
500 N. Capital of Texas Highway  
Building 8, Suite 250  
Austin, Texas 78746  
(512) 320-0430

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TEXALTEL is a trade association that represents competitive telecommunications carriers<sup>1</sup> that operate in Texas but provide service throughout the country, including the service territories served by AT&T, Verizon and Qwest as

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<sup>1</sup> TEXALTEL is a trade association of competitive telecommunications providers that do business in Texas. TEXALTEL was formed in 1982 as an association of long distance providers, but today its members have a wide array of business plans and provide a wide array of telecommunications, internet and other services. TEXALTEL's designated representative is the undersigned. TEXALTEL's members included: Alpheus, Bestline Communications, Capital Telecommunications, Covad Communications, DPI Teleconnect, Grande Communications, Huntleigh Communications, Local Telephone Service, Logix Communications, McLeod USA, Meriplex Communications, NovoLink Communications, Southern Telecom Network, Tex-Link Communications, TeleNetwork, Tel West Network Services, and TRC Telecommunications.

incumbent local exchange carriers (“ILECs”). TEXALTEL members provide a varying array of services to their customers including basic local telephone service, prepaid services, xDSL and other high speed data services, including cable and Voice over Internet Protocol services, also known as VoIP. TEXALTEL members have a vested interest in ensuring that the largest carriers cannot engage in anticompetitive conduct that would impair competitors’ ability to compete and/or artificially inflate the cost of network facilities purchased by competitors to finish the services they offer to customers. Similarly, as participants in the telecommunications marketplace, TEXALTEL advocates public policy that keeps the marketplace open to competitive carriers allowing consumers to have choices in services and providers for their communications needs. As such, our members have a substantial interest in this proceeding as our members compete often using unbundled network elements (“UNEs”).

TEXALTEL comes before the Federal Communications Commission (the Commission or FCC) today to submit comments on the Commission’s Notice seeking Comment on the Petition of McLeodUSA Telecommunications Services, Inc. (“McLeodUSA”). We appreciate the Commission providing the opportunity to provide comment in this proceeding.

## INTRODUCTION

TEXALTEL files these comments in response to the *Notice* regarding the McLeod Petition relating to the *Qwest Omaha Forbearance Order*. For the reasons stated herein, TEXALTEL strongly supports the McLeodUSA Petition. The Commission specifically anticipated the potential for a petition such as the one filed by

McLeodUSA should its predictive judgment regarding how competition would develop not come to fruition. Indeed, as demonstrated by the marketplace data including, but not limited to, the substantial price increases for wholesale services, the hopes of a newly developing competitive wholesale market have not been achieved.

## **SUMMARY**

Qwest, and other ILECs, gladly took on many obligations in 1996 as a part of FTA in order to be allowed to re-enter the long distance market. Now that they are entrenched in that market, they seem to be relieved of all agreements that they made in 1996. Although we present that as news, it is likely a “no brainer” issue at this point in time and is not at all surprising to competitors, regulators and others.

Qwest has made the same arguments to the FCC as other ILECs – the most common being that less regulation will lead to more competition. The FCC acted, in issuing its Omaha Forebearance Order, to test this theory. The FCC stated its “predictive judgment” that the predictions of Qwest would come true.

Now, almost 2 years after the Omaha Forebearance Order, we have a textbook opportunity to observe the results.

1. First, we have less competition as a result of the “order” – with at least one CLEC announcing it had decided not to compete in the Omaha market area because of the “Order”.

2. Second, Qwest has not, as predicted, negotiated just and reasonable wholesale rates, but has demanded that the only substitute for the UNEs that it is no longer required to provide must be special access rates that had been established years before, with many anticompetitive provisions included, or contracts that again work to

eliminate competition, not increase it.

3. Qwest's special access rates have increase over time.

4. Perhaps the most insidious ploy is Qwest's offer of discounts for those CLECs who buy all (at least 90%) of their services from Qwest. This move, common among ILECs, is aimed directly at preventing facilities based competition. While one would hope that Qwest's bad behavior would incent new competitors to build competing networks, they will have no market if other providers, such as McLeod, are locked into long term contracts that not only imposes huge penalties for switching existing business to a competitor's network, (or building its own network) but also have contract provisions that keep them from putting any material volume of new business on a competitor's network. Qwest has been allowed to erect a huge barrier to entry when new network providers do not have a market to sell to.

Statements to the contrary notwithstanding, Qwest does have a monopoly for certain elements as no other provider has a ubiquitous substitute for the last mile. To suggest that a competitor could start business by building a network and having no customers until it has ubiquitous coverage of all customers is not economically viable.

At least by this time, we all should be breathing a sigh of relief; the theory that competition can be maximized by reducing regulatory oversight has at last been given a textbook study and its failure has been proven clearly in Omaha. Hopefully we will not require a repeat of the days in the 1970s where competitors were told, in so many words, you are welcome to compete so long as you build your own networks to all customers before you can sign up customers.

We plead that the FCC not be fooled by Qwest's hollow efforts to show it offers

just and reasonable wholesale services. Yes, Qwest did offer a discount on analog loops, but only if the CLEC abandoned the use of UNEs throughout Qwest territory. That isn't an offer that is an insult to the intelligence of competitors and regulators. And it appears Qwest said it was willing to consider a reduction in non-recurring charges (that are at least 4 times its costs) for conversions off of UNEs, but never followed through with a specific offer or agreement.

Qwest's actions are a clear indication that it believes that the FCC's OFB order constitutes regulatory abandonment and a license to do anything it wished in order to squelch competition. We urge that the FCC clearly announce that a return to the days before FTA96, and reconstruction of the many huge roadblocks to competition that existed at that time, is not going to be public policy.

Beyond the confines of Omaha, this history teaches important lessons for other requests for UNE forbearance. The Omaha experiment provides empirical evidence and data that is helpful when considering any future forbearance petitions in other locals and by other incumbents that would be supported by the same predictive judgment as in *Qwest Omaha*. The data shows that while such petitions may argue that less regulation equals more competition it is a false claim and that the opposite will be the result.

**I. THE EMPIRICAL DATA DEMONSTRATES THAT THE EXISTING *QWEST OMAHA FORBEARANCE ORDER* REQUIRES MODIFICATION BASED ON ITS OWN ANALYSIS.**

As the saying goes, "those that do not learn from history are doomed to repeat it." This Commission to its credit understood that its predictive judgment in the *Qwest Omaha* matter was in some respects a leap of faith and understood that it would need

to monitor market developments and make corrections as those developments warranted. As such, the Commission anticipated that if the market did not develop in a manner consistent with the Commission's predictive judgment, that an affected party could and would file a petition for modification. This is what McLeodUSA has done here. The lack of a developed wholesale market as evidenced by take-it-or-leave-it contracts, substantial price increases, and onerous terms and conditions tailored to leverage market power in Omaha to force competitors requiring wholesale services to forego their legal rights elsewhere in the country are conclusive evidence that wholesale markets have not been developed in a manner necessary to alleviate market power held by Qwest and indeed market power that was enhanced by the *Qwest Omaha Forbearance Order*.

Although TEXALTEL did not agree with the *Qwest Omaha Forbearance Order* when it was issued, TEXALTEL does acknowledge the Commission's attempt at a creative solution to the "chicken and the egg" problem. The Commission through its predictive judgment approach in the *Qwest Omaha Forbearance Order* unleashed its experiment to answer the "what if" question, i.e. What if the UNE rules were abridged? Would the market really flood with new facilities-based competitors making those same UNE rules unnecessary? These "what if" questions not only were at the heart of the *Qwest Omaha Forbearance Order*, they were at the heart of the debate leading to the *Triennial Remand Order* ("TRRO") and the *Triennial Review Remand Order* ("TRRO").

Now we know the answer to these questions. The UNE rules are not the retardant to facilities-based construction and competition that the ILECs have alleged these many years. The ILECs have successfully positioned UNE rules as the bogeyman



to every perceived ill in the marketplace as they have sought a steady rollback of the obligations they agreed to when the 1996 Telecommunications Act was drafted.<sup>2</sup> They have also distracted policymakers with their UNE debate as they have consolidated from 7 Regional Bell Operating Companies, 2 large interexchange carriers, and the independent carriers of GTE and Southern New England Telephone (“SNET”) into 2 mega companies controlling the majority of land line and wireless lines in the country and one remaining RBOC.

The irony is that the competitors, such as TEXALTEL’s members, did not ask for the Qwest Omaha experiment but are the ones that have been proved correct by the empirical results of that experiment. And, it is the ILECs that pleaded for the result in *Qwest Omaha*, that are now seeking to undermine and contain the results of the experiment they sought.

What does the data show? Rather than wholesale competition holding prices down and leading to terms favorable to the buyers that predictively would have choices, prices have gone up substantially and Qwest has imposed anticompetitive terms. Choices have declined, and will decline further unless the Commission acts quickly. Nonrecurring charges for installing DS1 loops, for example, have increased by almost fourfold, DS1 loop rates have effectively doubled, and even DS0 loop rates have increased by a minimum of 30 percent.

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<sup>2</sup> Indeed, a recent report by Ofcom, the UK telecom regulator, concluded that that country’s unbundling rules have led to steep price declines for broadband services over the past five years. Thus, unbundling obligations in the UK has promoted the FCC’s goal of increasing broadband deployment, while the FCC has granted the ILEC’s numerous requests to eliminate their unbundling obligations at virtually every turn in the United States. See, *The Communications Market 2007*. <http://www.ofcom.org.uk/research/cm/cmr07/>

Furthermore, Qwest has imposed terms and conditions through term and volume clauses that force a competitor to either give up the “discounted” rates in Omaha or agree to higher rates elsewhere in Qwest territory. Surely if Qwest was facing new and stiff wholesale competition in Omaha, it would not be able to force a customer to pay much higher prices throughout all Qwest states in return for the honor of a discount in Omaha (“Regional Commitment Program”). Instead, this demonstrates that Qwest maintains substantial market power to impose broader market control as a condition for its willingness to “discount” from its high prices in Omaha. This is indicative of monopoly markets and cross-leveraging of monopoly power, not a competitive market. Indeed, Qwest’s conduct supports McLeodUSA’s assertions that it lacks alternative suppliers of network elements. If meaningful alternative suppliers existed, Qwest would not be able to act with such a heavy hand both in terms of pricing and conditions it seeks to impose.

It would be one matter if all that Qwest did was to increase its prices. The FCC’s predictions may well have come true and alternative networks might have arisen. But Qwest was much craftier than that. Qwest recognized the unlikelihood that any wholesale competitors would enter the Omaha market with ubiquitous coverage – meaning that no wholesale competitor would likely emerge that could provide all of the services that a retail service provider would need. Recognizing that all retail providers would still need many services from Qwest, Qwest reacted in an expected manner – establishing pricing and contract provisions that made it economically impossible for a retail provider to split its business between Qwest and another provider (even if one such provider exists in Omaha, which, the record establishes, is not the case).

**II. THE OMAHA EXPERIMENT PROVIDES VALUABLE INSTRUCTION ON HOW TO APPROACH OTHER FORBEARANCE PETITIONS.**

The experiment unleashed by the *Qwest Omaha Forbearance Order* provides valuable insight outside of Omaha as well. Since the *Qwest Omaha Forbearance Order*, the Commission has faced numerous “me too” petitions. In some ways it is telling that there was such a push to jump on the bandwagon before the results of the experiment were known.

What has been learned from the Omaha experiment is that the UNE rules remain a necessary protection against market power and market abuse. The removal of the UNE rules did not lead to the development of a wholesale market as the incumbents asked the Commission to predict. Instead, and as furthered by market consolidation, the result has been higher prices and onerous terms and conditions tailored to leverage existing market power to retard the future development of wholesale competition. Regardless of attempts by Verizon, AT&T, and Qwest to have this Commission ignore the lessons of Omaha, TEXALTEL believes the Commission will not doom the industry to repeat that history.

## CONCLUSION

TEXALTEL supports the initiative to have the Commission take action on the results from the Omaha experiment. The removing of UNE rules did not have the result the Commission had predicted. Instead, the result has been a rollback through higher prices and anticompetitive terms and conditions. The UNE rules now need to be reinstated by lifting the Commission's forbearance order so that benefits of competition that have been lost in Omaha can be revived.

Similarly, the Commission needs to take the lessons learned from this experiment and apply them when other incumbents seek their "me too" petitions. The Omaha experiment was premised on the belief that the incumbent arguments regarding how markets will develop without UNE rules would be proved correct. That hypothesis was proved wrong. So long as there is not a competitive market for the "last mile" – by competitors with ubiquitous coverage of all customers, there must

continue to be unbundling requirements imposed on the incumbents and meticulous enforcement of those requirements.

Thank you for your consideration of these comments.

Respectfully Submitted,

TEXATEL

By: /s/ Sheri Hicks

Sheri Hicks  
Policy Director

Charles D. Land  
Executive Director

STATE OF TEXAS )  
 )  
COUNTY OF TRAVIS )

**AFFIDAVIT OF SHERI HICKS**  
**ON BEHALF OF TEXATEL**

Before me, the undersigned authority, on this \_\_\_\_ day of August, 2007, personally appeared Sheri Hicks, who, upon being duly sworn, states the following:

1. My name is Sheri Hicks. I am over the age of 21, of sound mind, and am competent to testify as to the matters stated herein. I am the Policy Director for TEXALTEL. I have personal knowledge of the facts contained herein.
2. The facts contained in these comments and related attachments are accurate. Moreover, I have personal knowledge as to this information through the due course of my duties in my capacity as TEXALTEL's Policy Director.

Further Affiant sayeth not.

/s/  
Sheri Hicks

Sworn to and subscribed to before me this \_\_\_\_ day of August 2007, to certify which witness my hand and seal.

\_\_\_\_\_/s/\_\_\_\_\_  
Notary Public in and for the State of Texas  
My Commission expires: \_\_\_\_\_